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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 990 69

WALTER E. PEARSON, STATE TREASURER OF THE STATE OF OREGON,

Petitioner,

vs.

RUTH HAYES McGRAW AND EDMUND HAYES, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDWARD STEPHEN HAYES, DECEASED, AND AS INDIVIDUALS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON AND BRIEF IN SUPPORT THEREOF.

I. H. VAN WINKLE,
Attorney-General of Oregon,
DEAN H. DICKINSON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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IN THE MATTER OF THE ESTATE OF EDWARD STEPHEN HAYES, DECEASED.

WALTER E. PEARSON, STATE TREASURER OF THE STATE OF OREGON,

Petitioner,

vs.

RUTH HAYES McGRAW AND EDMUND HAYES, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDWARD STEPHEN HAYES, DECEASED, AND AS INDIVIDUALS,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

Walter E. Pearson, State Treasurer of the State of Oregon, respectfully petitions the Court to issue a writ of certiorari to the Supreme Court of the State of Oregon requiring that there be certified to the Supreme Court for determination by it that certain cause in which petitioner was respondent and respondents herein, Ruth Hayes McGraw and Edmund Hayes, as executors of the estate of Edward Stephen Hayes, deceased, and as individuals, were appellants.

A.

Summary Statement of Matter Involved.

Edward Stephen Hayes, a retired physician, died in Multnomah County, Oregon, February 11, 1936, at the age of seventy-nine years. He was a resident of and domiciled in the State of Oregon at the time of his death (R. 112). Until about six months before his death he possessed stocks, bonds and other intangibles worth in excess of $1,000,000.00, most of which were, and for some time had been, in the custody of Harris Trust & Savings Bank of Chicago, Illinois (hereinafter called Harris Bank) (R. 114). The Harris Bank acted as financial agent and advisor of Hayes in the safekeeping and investment of his personal fortune (R. 113).

In the fall of 1935, decedent's age and health were such that he distributed most of his estate by creating two trusts, with the Harris Bank as trustee, known as Edward Stephen Hayes Trust No. I and Edward Stephen Hayes Trust No. II (R. 118, 120). At his death he left property to the value of $28,228.91, which was disposed of by his last will executed September 25, 1935 (R. 17).

Respondents as executors of decedent's estate have admitted and paid inheritance tax to the State of Oregon on the probated estate and on that portion of the decedent's assets which were distributed by means of Trust No. II (R. 20, 122).

The State of Oregon, by its State Treasurer, seasonably demanded that inheritance tax be determined and paid upon the portion of decedent's assets which he had distributed by creating Trust No. I with the Harris Bank as trustee (R. 62). The tax is asserted under Section 10-601 Oregon Code 1930 (as amended by Chapter 26, Laws of Oregon, 1933), a copy of which is hereto attached (Appendix A). So far as material in this case, the statute reads:

"All property within the jurisdiction of the state, and any interest therein, * * * whether tangible or intangible, which shall pass or vest by * * * will or by statutes of inheritance * * *, or by deed, grant, bargain, sale or gift, or as an advancement or division of his or her estate made in contemplation of the death of the grantor, or bargainor, * * * in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectation, to any property or income thereof, shall be and is subject to tax at the rate hereinafter specified in section 10-603, to be paid to the Treasurer of the state for the use of the state; * * *."

It is stipulated that at the date of his death and at the time the gift in question was made, Edward Stephen Hayes was domiciled in the State of Oregon (R. 112); and that the deceased made the gift as a distribution of his estate in contemplation of death (R. 119). No question of interpretation of Oregon statutes is involved; and it is conceded by respondents that if the property which was the subject of this transfer was within the jurisdiction of the State, the statute just cited is broad enough to subject the transfer to inheritance tax.

The transfer in question was a gift of $450,000.00 in paper money made by the deceased at Chicago, Illinois. Decedent obtained the currency by liquidating his bonds and he placed it in Chicago for the sole purpose of making the gift.

The facts of the case have been stipulated by the parties (R. 111, 136, 137), and as regards the distribution of decedent's estate by means of Trust No. I are as follows:

On August 8, 1935, Hayes directed Harris Bank to liquidate sufficient of his bonds to realize a fund of $450,000.00, and with that money to purchase Federal reserve notes of equal face value. The Bank proceeded to do so and by August 12, 1935, had realized from sale of bonds $176,-

062.01, to which the bank added $90,000.00 from Hayes checking account and $183,937.99 which is advanced to him on his promissory note (R. 115). This note was liquidated before the end of August by further sale of decedent's bonds. Between August 12th and August 15th, Harris Bank obtained for Hayes, with the money thus realized, forty-five Federal reserve notes of $10,000.00 denomination which it placed in the safe deposit box in his name at Harris Bank in the State of Illinois (R. 116).

On August 15, 1935, at Portland, Oregon, Hayes executed Trust No. I, by which he irrevocably transferred the Federal reserve notes to the Harris Bank, as trustee, for the sole use of his children and other beneficiaries (R. 118). Hayes forwarded the trust instrument to Chicago by air-mail and Harris Bank executed it in that city on August 17, 1935, and took possession of the money. Thereafter, commencing August 19, 1935, the trustee, from time to time, reconverted the money into securities and other personal property (R. 119). The record discloses no motive for the conversion of the intangibles into paper money before making the gift, other than the obvious one of attempting to evade the inheritance tax which the State of his domicile would impose on a gift of the bonds themselves.

Respondents assert that this gift is not subject to inheritance tax of the State of Oregon in his estate because the subject matter of the gift was tangible personal property situated in another state. In their first pleading and throughout the case, respondents defend on the ground that the imposition of inheritance tax on said gift by the State of Oregon deprives respondents of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Sections 18, 21 and 32 of Article I of the Constitution of the State of Oregon.

On the other hand petitioner contends that the paper money had no situs for taxation in Illinois because it was placed there for a single isolated transaction unconnected with any use or business in that State, because the gift was staged outside the State of Oregon solely to defeat inheritance tax at decedent's domicile. The State of the domicile has jurisdiction to tax all tangible personalty of its residents which is not shown to have obtained a separate and permanent situs elsewhere.

The Supreme Court of the State of Oregon held that the gift was beyond the taxing jurisdiction of this State.

B.

Reasons for Allowance of Writ.

I.

The decision of the Supreme Court of Oregon conflicts with decisions of this Court as to the taxable situs of tangible personal property, because it holds that the physical presence of the paper money in Illinois at the moment of gift was in itself sufficient to determine its situs for taxation and to deprive the State of the owner's domicile of jurisdiction to tax. The decision ignores the general right of the State of domicile to tax all of the personal property of its citizens, wherever found, which is not shown to have obtained a separate situs through use, storage or employment in some other place. In these particulars the holding of the Supreme Court of Oregon is contrary to principles announced in the following decisions:

Southern Pacific Co. v. *Kentucky*, 222 U. S. 63, 32 S. Ct. 13, 56 L. Ed. 96;

Cream of Wheat Co. v. *County of Grand Forks*, 253 U. S. 325, 40 S. Ct. 558, 64 L. Ed. 931, 934;

Frick v. *Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058;

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150;

City Bank Farmers Trust Co. v. *Schnader*, 293 U. S. 112, 55 S. Ct. 29, 79 L. Ed. 228;

Blodgett v. *Silberman*, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749.

II.

The attempt of this decedent to arrange for succession to his estate in a place outside Oregon by converting his assets momentarily into currency and giving it away in Illinois is a fraud on the revenue in the State of his domicile.

Shotwell v. *Moore*, 129 U. S. 590, 32 L. Ed. 827;

Baldwin v. *Missouri*, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056.

III.

The decision of the Supreme Court of Oregon in this case is not strengthened by its holding in the opinion on rehearing that the decedent's intangibles had a business situs in the State of Illinois; for the record affirmatively shows that this decedent was not conducting any business in the State of Illinois within the meaning of that term as defined by this Court.

New Orleans v. *Stemple*, 175 U. S. 309, 20 S. Ct. 110, 44 L. Ed. 174;

Blodgett v. *Silberman*, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749.

IV.

The decision of the Supreme Court of Oregon is of great interest and concern to the various States in the enforcement of their inheritance tax laws, because if not reversed it opens a ready avenue by which a decedent's estate can, at the last moment, be broken up into small parcels and so

placed in several States as to avoid all inheritance tax. The decisions of this Court uphold taxation of tangible personal property at the owner's domicile unless it has obtained a permanent and *bona fide* abiding place elsewhere.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Oregon, and that the cause may be reviewed and determined by this Court and that the judgment of the Supreme Court of the State of Oregon may be reversed by this Court.

WALTER E. PEARSON,
State Treasurer of
the State of Oregon,
By I. H. VAN WINKLE,
Attorney-General of Oregon,
DEAN H. DICKINSON,
Counsel for Petitioner.

APPENDIX A.

Inheritance Tax Laws.

Section 10–601, O. C. 1930. Property and transfers subject to tax—Exceptions.

All property within the jurisdiction of the state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass or vest by dower, curtesy, will or by statutes of inheritance of this, or any other state, or by deed, grant, bargain, sale or gift, or as an advancement or division of his or her estate made in contemplation of the death of the grantor, or bargainor, or intended to take effect in possession or enjoyment after the death of the grantor, bargainor or donor to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectation, to any property or income thereof, shall be and is subject to tax at the rate hereinafter specified in section 10-603, to be paid to the treasurer of the state for the use of the state; and whenever property, real or personal, other than real property held by the entirety, is held in the joint names of two or more persons, or deposited in banks or other institutions or depositories in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving joint tenant or tenants, person or persons to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this act in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased joint tenant or joint depositor and had been devised or bequeathed to the surviving joint tenant or tenants, person or persons, by such deceased joint tenant or joint depositor by will, excepting therefrom such parts thereof as may be shown to have originally belonged to such surviving joint tenant, joint depositor or person, and never to have been acquired from the decedent for less than a fair consideration in money or money's worth, and if said prop-

erty shall have been acquired from decedent for less than such fair consideration, there shall be excepted from the value of said property a portion equal to the amount of the consideration so furnished; and all heirs, legatees and devisees, administrators, executors and trustees, and any such grantee under a conveyance, and any such donee under a gift made during the grantor's or donor's life, shall be respectively liable for any and all such taxes, with interest thereon, until the same shall have been paid as hereinafter provided; provided, however, that devises, bequests, legacies and gifts to benevolent, charitable or educational institutions, societies, associations or corporations organized or existing within this state and actually engaged in this state in carrying out the objects and purposes for which so organized or existing, or to a corporation, association or society to be organized for such purposes under the laws of this state pursuant to the terms of the instrument providing such devise, bequest or gift; and devises, bequests, legacies or gifts to any corporation, society, institution, person or persons or association of persons in trust for such charitable, benevolent or educational purpose where such devise, bequest, legacy or gift is limited by the donor for use within the United States of America shall be exempt from taxation under the provisions of this act; and provided further, that there shall be exempted from taxation under this act all proceeds and contract of life insurance taken out at any time on the life of the decedent and payable to a beneficiary or beneficiaries other than the estate or the executor or administrator of the estate of the deceased insured, whether payable directly or to or through a trustee, immediately or at future dates; but such exemptions shall not include any investment policy issued by a life insurance company which does not include in the policy the element of life insurance. Any transfer of property made by a decedent by deed, grant, bargain, sale or gift, within three years prior to said decedent's death without a valuable and adequate consideration therefor, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this act.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Supreme Court of the State of Oregon is reported in Vol. 28, Oregon Advance Sheets 103 and 403, 86 Pac. (2d) 424 and 87 Pac. (2d) 766 (R. 141).

Jurisdiction.

The judgment of the Supreme Court of Oregon was entered on the 17th day of January, 1939 (R. 166). A petition for rehearing was filed February 18, 1939, within the time provided therefor as extended by order of the Supreme Court entered February 8, 1939 (R. 168). Petition for rehearing was considered by the court and thereafter denied on March 7, 1939 (R. 211).

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by the Acts of December 23, 1914, c. 2, 38 Stat. 790; September 6, 1916, c. 248, Section 2, 39 Stat. 726; February 17, 1922, c. 54, 42 Stat. 366; February 13, 1925, c. 229, Section 1, 43 Stat. 937; Jan. 31, 1928, c. 14, Section 1, 45 Stat. 54.

Respondents herein claimed and specially set up in their answer and amended answer that the gift of $450,000.00 in paper money made by Hayes to the Harris Bank was immune from inheritance tax of the State of Oregon in the estate of said decedent under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Sections 18, 21 and 32 of Article I of the Constitution of the State of Oregon for the reason that said transfer was a gift of tangible personal property situated beyond the taxing jurisdiction of the State of Oregon. The Supreme Court of the State of Oregon upheld this contention and reversed the Circuit Court.

Statement of the Case.

This action arises out of objections seasonably filed by the Treasurer of the State of Oregon to an *ex parte* order of the Circuit Court of Multnomah County, Oregon, determining the amount of inheritance tax in the Hayes estate. In his objections the State Treasurer demands that inheritance tax be determined and paid to the State of Oregon upon paper money of the value of $450,000.00 which was given by the deceased to the Harris Trust & Savings Bank of Chicago, Illinois, under an irrevocable trust created by him August 15, 1935. Respondents, as executors of decedent's estate and as individual beneficiaries, answered contending that the gift consisted solely of currency physically located in Chicago, which was beyond the taxing jurisdiction of the State of Oregon. The State Treasurer replied and the matter being tried upon a written stipulation of the facts, resulted in a decree of the Circuit Court determining that the gift was subject to tax. The facts surrounding creation of the gift have been outlined in the foregoing petition.

On appeal the Supreme Court of Oregon held that the Federal reserve notes had no taxable situs in Oregon when given in trust by deceased and hence the gift was not subject to inheritance tax in Oregon. It is stipulated that decedent was domiciled in the State of Oregon, and was in contemplation of death at the time he made the gift. It is conceded by respondents that the inheritance tax law of the State of Oregon is broad enough to impose tax on this gift, provided the property which was the subject matter of the gift was within the taxing jurisdiction.

Specification of Error.

The Supreme Court of Oregon erred in holding that the State of Oregon does not have jurisdiction to tax the gift.

Summary of the Argument.

I.

Tangible personal property is taxable at the domicile of its owner where it is not shown to have acquired a separate abiding place in some other State.

II.

The State of domicile does not lose jurisdiction to tax tangible personal property of its citizens even though the property is outside the State until it is shown that the property has acquired a separate situs through use or employment in some other place.

III.

Jurisdiction of the State of domicile to tax tangible personal property is not defeated where the owner places the property temporarily outside the State to avoid taxation.

Argument.

Petitioner's position is that Oregon, as the State of decedent's domicile, has jurisdiction to impose inheritance tax upon the transfer in contemplation of death of all the decedent's personal property which is not shown to have had a definite abiding place elsewhere. This record affirmatively shows that decedent's ownership of the paper money was temporary and its physical presence in Chicago at the date of the gift was merely transitory as far as decedent was concerned.

All property must have a situs somewhere, and under the maxim *mobilia sequuntur personam*, personal property,

either tangible or intangible, is generally deemed to have its situs and to be subject to tax at the domicile of the owner.

Endicott, Johnson & Co. v. *Multnomah County,* 96 Or. 679;

Callendar Navigation Co. v. *Pomeroy,* 61 Or. 343, 352;

Southern Pacific Co. v. *Kentucky,* 222 U. S. 63, 32 S. Ct. 13, 56 L. Ed. 96.

It is conceded that an exception to this rule has been established to the effect that a State cannot tax tangible personal property of its citizens where such property has, by continued use or location, obtained a situs of its own, outside the State of the domicile.

Blodgett v. *Silberman,* 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749;

Frick v. *Pennsylvania,* 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058;

Union Refrigerator-Transit Co. v. *Kentucky,* 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150.

But the exception last noted only applies to cases where the facts show a definite location of the tangibles in a place apart from the domicile of the owner, and thus overcome the presumption of situs at the domicile. The limitation imposed by the Fourteenth Amendment is merely that a State may not tax a resident for property which has acquired a permanent situs beyond its boundaries.

Cream of Wheat Co. v. *County of Grand Forks,* 253 U. S. 325, 328, 40 S. Ct. 558, 64 L. Ed. 931, 934.

The degree of permanence with which tangibles must be kept in a place other than the owner's domicile in order to attain a separate situs, has been variously described by this Court as "Permanent location elsewhere", *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63, 32 S. Ct. 13, 56 L.

Ed. 96; "actual situs", *Frick* v. *Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058; "located and employed in other states", "permanently located", *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 56 L. Ed. 150; "not merely transient, transitory or temporary, but * * * fixed in an established abiding place", *City Bank Farmers Trust Co.* v. *Schnader*, 293 U. S. 112, 55 S. Ct. 29, 79 L. Ed. 228. In the light of their respective facts the above decisions clearly indicate that to come within this exception, the tangibles in question must have arisen out of, or been used in connection with some local business; or must have been kept, stored or exhibited with some substantial degree of permanence in the other State. It has never been held by this Court that mere physical location is sufficient without proof of some of the additional factors last mentioned to establish a taxable situs for tangible personal property apart from the owner's domicile.

Southern Pacific Co. v. *Kentucky, supra*;
Cream of Wheat Co. v. *County of Grand Forks, supra.*

The case at bar is not within the exception to the rule that movables are taxable at the domicile because the record is devoid of any evidence of permanence in the location of the paper money in Illinois as far as this decedent was concerned. On the contrary the record affirmatively shows that the money was owned by decedent for only three or four days; that it did not arise out of any business conducted in Illinois; nor was it obtained, used or kept in connection with any business. It is stipulated that the money was obtained for one specific and isolated transaction, that is, as the vehicle for making an immediate and final gift. One transaction does not constitute a business, nor can giving away one's estate be properly termed a "business." Paper money is an inherently movable article which only fulfills its function by passing from hand to hand and from

place to place in the course of business. This characteristic of mobility is even more pronounced in money than in sea-going vessels, which the Court has said to have no permanent situs anywhere.

Cream of Wheat Co. v. *County of Grand Forks, supra; Southern Pacific Co.* v. *Kentucky, supra.*

In the latter case, vessels were held taxable at the domicile of the owner in Kentucky although they had never been in that State and, being ocean-going vessels, could never be brought to Kentucky. The service which these ships rendered for their owner in its shipping business was all performed outside the State of domicile. In the case at bar ownership and use of the money by decedent was not connected with any business in Illinois but on the contrary was as transient and transitory as it could be made.

In the absence of any evidence of permanence in use or ownership of this currency in Illinois the Supreme Court of Oregon sought support for its holding by tracing the currency back into bonds which were liquidated to obtain the money. It was suggested in the original opinion, and held in the opinion on rehearing, that the bonds themselves out of which the currency was obtained had been left by decedent in the custody of an Illinois agent for a number of years and thus obtained a "business situs" in that State, which carried over into the currency. In support of this holding the Oregon court relied largely upon *New Orleans* v. *Stemple*, 175 U. S. 309, 20 S. Ct. 110, 44 L. Ed. 174. But this case does not support the holding because in *New Orleans* v. *Stemple* the intangibles held taxable in Louisiana were used in carrying on a business in that State. In *Blodgett* v. *Silberman, supra*, a resident of Connecticut who conducted all of his business in New York City, left bonds and other intangibles in his New York safe deposit box. None of the bonds had ever been in the State of

Connecticut but were habitually kept in the State of New York. This Court held the bonds taxable at decedent's domicile in Connecticut and the opinion states that *New Orleans* v. *Stemple* had little or no bearing for the reason above stated.

The record in this case shows that the decedent was retired. He conducted no business in any place except the investment of his own fortune. The mere management by an agent in Chicago of Dr. Hayes' private investments under his direction and subject to his control does not constitute "doing business" in that State; *Manufacturers Trust Co.* v. *Hackett*, 118 Conn. 101, 170 Atl. 792. The situation is not comparable to that in *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 50 S. Ct. 59, 74 L. Ed. 180, where securities were irrevocably committed to the custody of a trustee. In the case at bar Dr. Hayes was in full control and could have ordered the securities forwarded to his domicile at any moment.

The fact that decedent selected a bank outside the State of Oregon as trustee of the gift is immaterial, for the gift itself was the taxable event and we are not concerned with the location of the trust after the gift was made.

If Dr. Hayes had died possessed of the bonds there is no doubt that the State of Oregon would have had jurisdiction to impose inheritance tax thereon in his estate.

Farmers Loan & Trust Co. v. *Minnesota*, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371;

Baldwin v. *Missouri*, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056.

The State of Oregon likewise had jurisdiction to tax an irrevocable gift of these bonds in contemplation of death. The only motive which the decedent could have had in converting the bonds into paper money was to place himself in possession of something tangible long enough to com-

plete a gift of this capital in Illinois, and thus, if possible, create a taxable situs outside the State of his domicile. It was admitted on the argument in the court below that such was his purpose. In *Baldwin* v. *Missouri, supra,* this Court reserved for future consideration a case where a decedent should "undertake to arrange for succession" in some State other than his domicile and "thus defeat the collection of the death duties prescribed at his domicile". In the case at bar a studied, but last moment, effort was made to arrange for succession outside the State of Oregon in the capital which he intended to place in Trust No. I. This gift has been given the form but it does not have the substance of a bona fide transaction. It is a fraud on the revenue of the State of Oregon which should not be tolerated.

Shotwell v. *Moore,* 129 U. S. 590, 32 L. Ed. 827;
Poppleton v. *Yamhill County,* 8 Or. 338.

Respectfully submitted,

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DEAN H. DICKINSON,
Counsel for Petitioner.

(1913)